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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-386

Richard A. Hickland

Petitioner,

against

Alice M. Hickland

Respondent.

PETITION FOR WRIT OF CERTIORARI:
TO THE COURT OF APPEALS FOR
NEW YORK STATE

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the State of New York rendered in this action on February 24, 1976 as to which a rehearing was denied on June 17, 1976. That opinion reversed in part a Decision of the Appellate Division, Third Department,

of the Supreme Court for the State of New York by reinstating a requirement for alimony payments which had been reversed by the Appellate Division, Third Department, in its Decision rendered on December 18, 1974. In the same opinion that Court of Appeals upheld the reversal by the Appellate Division of the Trial Court's judgment which barred the petitioner from any access to or use of his farm lands.

In denying rehearing of the case, the Court of Appeals for the State of New York made no explanation, stating only, "Motion for reargument denied."

CITATIONS TO OPINIONS BELOW

The decision of the Trial Court (Supreme Court, State of New York, Washington County) is attached as Appendix A. The decision of the Appellate Division, Third Department, reversing significantly the decision of the Trial

Court, is attached as Appendix B. The opinion of the Court of Appeals for the State of New York, reversing in a significant way part of the decision of the Appellate Division, Third Department, is attached as Appendix C. The decision of that Court of Appeals denying reargument is attached as Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the State of New York was rendered on February 24, 1976. Petitioner's timely petition for a rehearing was denied on June 17, 1976.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The Constitutional issue has been raised in the state court below.

QUESTIONS PRESENTED

1. May any court within the United States of America require that because of

a divorced status a citizen must migrate to (or return to) a profession or vocation which will increase or maximize his income so that he can do more for an ex-spouse than he would have been required to do had he remained married to that person, or is that a violation of the United States Constitution, the XIV amendment?

2. Is it a violation of the United States Constitutional amendment number XIII which abolishes slavery to dictate that farming - or any other legal vocation or profession - is "not a reasonable occupational choice" for any person and to dictate that a person must enter a profession or vocation which will increase or maximize their income?

3. Is it in violation of the basic concepts and tenets of true justice for any court within the United States of America to fabricate a version of fact to support a position rather than to adhere

to the evidence as presented? And would it be a larger violation in the case of a court authorized to review the law only?

STATUTES AND RULES INVOLVED

Involved herein is the basic tenet on which the United States of America was founded: that liberty and the pursuit of happiness are inalienable rights (Declaration of Independence) and that all are created equal. Also involved are the XIII and XIV amendments to the Constitution of the United States.

STATEMENT CF THE CASE

The petitioner and respondent were married in 1946, subsequent thereto both parties were employed in various positions and lived in some six different states. The respondent's employment since the early 1960's until the time of the parties separation in 1972 and following to-date of the trial in 1974 was as an elementary school

teacher. The petitioner was born on a farm in Massachusetts and wished to return to the vocation and life style of farming. To this end he began to purchase and improve farm properties while remaining in industry. He purchased a 73 acre farm in Salem, New York in 1963. Shortly thereafter he purchased an adjoining 20 acres.

In September of 1966, the petitioner became Executive Vice President of a financially distressed company headquartered in Warren (Detriot), Michigan. Because of the financial distress of the company the petitioner voluntarily deferred a portion of his income. In January 1968, he notified the President (and Chief Executive Officer) that he wished to leave industry for full-time farming and gave his notice. At year end 1968, the petitioner terminated his employment with the company except for a maximum of 20 hours/month under a consulting arrangement and moved from Michigan

to New York State and commenced full-time farming. The petitioner borrowed funds from a sister for the purpose and in April 1969 purchased a third piece of farm property of 185 acres. At the same time he used his deferred compensation to purchase a herd of 20 registered Hereford beef cows and a bull and some farm equipment.

In October 1969, the petitioner was involved in a tractor accident and sustained injuries which required a series of operations extending for 4 years (the last in December 1973) and leaving the petitioner partially disabled. During 1970, a previous business associate of the petitioner invited him to do some management consulting work while he was restricted physically. He did do consulting work and other similar offers followed, some of which were accepted and some of which were not. The funds so derived were used to pay for farm start-up costs and the extra costs incurred as

a result of being physically incapacitated by the tractor accident.

The petitioner and respondent separated in January 1972. A separation agreement was signed by both parties but the respondent shortly thereafter breached the agreement and subsequently was successful in having the court declare it null and void.

A non-jury divorce trial was held in the Supreme Court, State of New York, Washington County. During calender call the Presiding Justice was striken and died later that day. A County Court Judge was substituted in an "acting" capacity.

The Trial Court granted exclusive possession of the 185 acre farm to the respondent as well as alimony of $50/week, and child support of $50/week.

The Appellate Division, Third Department, Supreme Court, State of New York reversed this decision eradicating the alimony

and granting use of the farm lands for the purpose of farming to the petitioner. That court stated "since plaintiff lacks the actual financial ability to pay the alimony and defendant has ample income to support herself, we are of the opinion that the judgment should be further modified to strike out that portion which requires plaintiff to pay alimony at the present time."

The Court of Appeals for the State of New York upheld the position of the Appellate Division, Third Department, relative to the use of the farm land but distorted some facts in the case, added figments of their imagination, and made absolutely false statements to synthesize a basis for reversing the Appellate Division relative to the payment of alimony. The decisions of the Court of Appeals and the Appellate Division, Third Department, are at a great variance relative to human

rights.

REASONS FOR GRANTING THE WRIT

The decision of the court below presents important federal questions for decision by this court.

A. The distortion of facts and synthesis of so-called facts by the Court of Appeals for the State of New York sets a precedence for injustice going to the very heart of the XIV amendment to the Constitution. That amendment endeavors to secure an objective, factual based, equal treatment for all aspects to our justice system. In the ultimate, complete and true justice is probably an impossibility but that should not be an excuse for a sloppy judiciary which ignores or distorts the facts, and the highest Court in our land should not allow the possibility of this fault and Constitutional violation to go unreviewed.

B. The need for a United States Supreme Court clarification as to the

balance of a person's right to individual freedom and the pursuit of personal happiness and their obligations to an ex-spouse is due if not overdue. The number of divorces in the United States being reported at 1,000,000 for the last year and apparently - from the statistics - still increasing, this matter affects millions and millions of Americans.

C. There is a clear need for this Court to determine whether demanding more of an ex-spouse is in violation of the United States Constitution, particularly when it dictates that he must maximize his income or suffer the punitive action of having his property confiscated by a procession of money judgments.

D. There is a clear need for this Court to decide whether the extensive litigation which results when the courts attempt to impose involuntary servitude in divorce situations by directing that one

party must abandon a chosen vocation and pursue another to add to the wealth of someone who already has greater wealth and greater income is of social value or a misuse of the justice system.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion of the Court of Appeals for the State of New York.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK
COUNTY OF WASHINGTON SUPREME COURT

RICHARD A. HICKLAND,

Plaintiff,

-against-

ALICE M. HICKLAND,

Defendant.

DECISION

DIER, J.:

In this action for divorce brought by the plaintiff-husband against the defendant-wife for cruel and inhuman treatment, the wife has interposed a general denial and two counter-claims against the husband for divorce, the first on the grounds of cruel and inhuman treatment; the second, on adultery. At the commencement of the trial, defendant withdrew the adultery

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counterclaim and both parties stipulated that the matter be tried before the court without a jury.

Although the complaint was drawn and prior negotiations and conferences conducted by plaintiff's attorney, plaintiff elected to appear pro se in the matrimonial status portion of the litigation and, as the record will show, he chose to, and did, appear by counsel with respect to the property issues.

The parties intermarried in Springfield, Massachusetts on July 20, 1946. There are two issues of the union, an emancipated female who has reached her majority and an infant son, Cole, born May 16, 1955, presently in the physical custody of his mother, the defendant herein.

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During the course of the marriage, both parties obtained college educations and moved to Michigan where plaintiff-husband found employment with an engineering firm.

In the course of events, plaintiff evinced an interest in leaving the industrial community and undertaking the life of a farmer. This was apparently discussed between the parties and subsequently land purchases were made in Washington County toward that day. The various land purchases occurred during the period from 1963 to 1969.

Even prior to the time the parties undertook farming, there was evidence of unrest and disagreement between them, but serious problems arose shortly after the transition from industry to farm. The plaintiff became disabled as a result of a farm accident and, upon invitation,

returned to industry as a consultant with substantial earnings. In the course of the trial, plaintiff testified that he was able to earn as much as $2,000.00 per week. The farm, on the other hand, has never been a profitable venture averaging a loss of approximately $20,000.00 per year from the outset to the present.

At the point plaintiff returned to industry, the marriage became stormy and, as the intensity of the storm increased, the parties became more and more disenchanted with the relationship, ultimately separating in January, 1972. Thereafter a separation agreement was entered into by the parties, the intent being to resolve the property aspects of their matrimonial difficulties. This agreement was declared null amd void by order of the Hon. Edmund L. Shea, a justice of this court, by order dated June 26, 1973, based on a decision

rendered following a lengthy trial.

The court has previously indicated its decision as to the matrimonial status from the bench but the same is included herein for record purposes; namely, that the plaintiff-husband has failed to sustain the burden of proof as to his cause of action and the same is dismissed and that the defendant-wife, by a fair preponderance of the credible evidence, sustained her burden of proof as to her first counterclaim and the same is granted.

Now, once again, the court is called upon to determine the property rights of the parties as well as questions of support and custody, all problems without any solutions that will be satisfactory to both parties.

The court sees no reason, on the evidence presented, to change the custody of the infant son and, accordingly,

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custody of the infant, Cole Hickland, is awarded to the defendant wife. No specific provision for visitation is made as the infant is almost nineteen years of age. This is without prejudice to the right of either parent, if they are unable to resolve the issue, to make application for a determination by the court.

With the paucity of data adduced at the trial, often times unsubstantiated, as to the true income and expenses of the parties, the court finds the task of determining the financial questions difficult to say the least.

On the one side, the plaintiff-husband testified that as a vice-president of Briggs, his former employer, he received $45,000.00 annually ($40,000.00 salary and $5,000.00 bonus) plus stock options. Since terminating this employ-

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ment, he testified that he has worked as a consultant; that he could and has earned as much as $2,000.00 per week in such capacity. Plaintiff choses to leave his lucrative employment and become a farmer where instead of an earning capability of $45,000.00 annually, he loses $20,000.00. It is interesting to note here that plaintiff has divested himself of any interest in the animals, farm machinery or equipment and, prior to Judge Shea's decision, of the land itself.

The defendant-wife, on the other hand, testified, without contradiction, that she earned some $10,000.00 plus a year. However, the records of the Schuylerville Central School, by whom she is employed, and which are in evidence, indicate that her annual salary is $12,000.00 plus, the figure the court will consider. She has testified as to the annual living

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expenses of approximately $8,700.00 which, since there is no evidence to the contrary before the court, must be construed as including the expenses of the infant son residing with the defendant.

The purpose of alimony is to enable a wife to have sufficient means to live in a manner comparable to the one prevailing at the time the parties lived together (Blaufarb v Blaufarb, 19AD 2d 86). Courts, however, must consider in addition to the standard of living the parties enjoyed during marriage, the length of the marriage, the ability of the wife to be self-supporting and the circumstances of the case and respective parties, (S 236 D.R.L.), and balance, realistically, the needs of the wife against her independent ability to meet them with her husband's ability to pay (Berlin v Berlin, 36 AD 2d 763, appeal

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dismissed 28 NY 2d 489). The balancing of these factors may, however, be of greater relevancy when awarding alimony from a modest income and of less importance than the standard of living of the parties when the husband has substantial assets or income (Millner v Millner, 60 Misc 2d 122).

It is undisputed that the time the parties lived together, plaintiff-husband had an income in excess of $45,000.00 per year and that the family fully enjoyed the benefits of this income, including travel and entertainment. Now, merely because the plaintiff chooses to be a farmer, with a minimal income or none at all, he asks this court to award alimony based on that income. The court is not so limited, and may consider not only his actual earnings but his potential earnings and earning ability (Hoffman v Hoffman,

69 Misc. 2d 245) and having chosen to be a farmer he cannot now claim dissatisfaction if the court "estimates the value of his faculties, causing a draft upon his very capital" (Bittson v Bittson, 183 NYS 2d 294, aff'd 285 AD 1061).

Based on the testimony presented, the court determines that the plaintiff, if he chose to be regularly employed as a consultant, could easily earn, net, $30,000.00 annually, whereas, the defendant wife, even using the $12,000.00 plus figure shown in the school records, could not expect to have an after-tax income of much more than $7,500.00 annually.

Further, the record indicates that the infant son is a part-time college student and additional funds are required for his support, education and maintenance, although no specific testimony was adduced

as to the exact amount, leaving the court to speculate on this figure.

Keeping in mind the pre-separation living standard of the parties, the earning capability of the plaintiff and of the defendant, the assets of each, the needs of the defendant and the totality of circumstances surrounding this case, the court awards the defendant wife the sum of $50.00 per week for the support of the infant, Cole Hickland, until he shall have attained his majority or become self-supporting, whichever shall sooner occur.

In this regard, the motion upon which the court reserved decision with respect to whether or not the support proceeding should be continued in Family Court or decided here, the awarding of support for the infant, Cole Hickland, is determined herein and this court does not intend to refer any such question to, nor is it

bound by any temporary or permanent order of the Family Court of the State of New York, County of Washington.

The parties have substantial real estate holdings as tenants by the entirety, but there is no motion before this court for a determination of title to those parcels. Further, the court is unable to award possession of the marital residence to defendant since it is bound by the decision of Hon. Edmund L. Shea holding that the title to same is in the sister, Adelaide Eaton, subject to the right of defendant to maintain as action to set aside the transfer as a fradulent conveyance. Under the circumstances, the best the court can do is to award possession of one of the other parcels to the defendant for her occupancy and, accordingly, the court awards possession and occupancy of the

property referred to as the Argyle Farm to the defendant.

No evidence was adduced at the time of trial as to the ownership of any of the chattels and the court, therefore, makes no determination.

Likewise, no evidence was presented to the court concerning the need for an award of counsel fees to the defendant-wife to enable her to carry on this proceeding and having due regard for the circumstances of the parties no such award is made.

Submit findings and judgment accordingly.

Signed and dated at the Town of Queensbury, New York, this 15th day of March, 1974.

JOHN G. DIER /s/

JOHN G. DIER, Assigned
Justice of the
Supreme Court

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Distribution:

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APPENDIX B

SUPREME COURT - APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

December 18, 1974 23809

RICHARD A. HICKLAND, Appellant,

v.

ALICE M. HICKLAND, Respondent.

Appeal from a judgment of the Supreme Court in favor of defendant, entered April 16, 1974 in Washington County, upon a decision of the court at a Trial Term, without a jury.

This is an action for a divorce brought by the plaintiff husband in which the defendant wife counterclaimed for a divorce and denied a divorce to the husband. The judgment also granted the wife custody of a son born May 14, 1955, together with $50 per week for his support. It also gave the wife exclusive possession and occupancy of premisies known as the "Argyle Farm".

Finally, it allowed the wife $50 per week alimony. The husband appealed.

The parties were married July 20, 1946. They have two children, only one of whom is a minor. Prior to 1963, the husband wanted to go into farming. In 1963, a 73 acre farm was purchased in Salem and 1965, 20 adjacent acres were added. In 1969, a 174-acre farm was purchased in Argyle. The parties moved to Washington County in 1969 and resided thereafter on the Salem property. The husband entered into the farming business with the consent of the wife. Prior thereto he had earned between $35,000 and $50,000 per year with a manufacturing concern. The farm, however, has never shown a profit. The wife is a school teacher and earns $12,000 per year, plus fringe benefits providing life, accident and health insurance and a retirement plan. The parties separated

pursuant to a separation agreement in January, 1972. The agreement was thereafter determined to have been rescinded by the parties. (Hickland v. Hickland, ___A D 2d___decided Nov. 7, 1974). The Salem property, which had been the marital residence, is now owned by the husband's sister. The Argyle farm is jointly owned by the parties.

Plaintiff raises three issues on this appeal. He contends the court erred (1) in awarding exclusive possession of the Argyle property to the defendant; (2) in granting defendant alimony and (3) in denying his motion to retain the child support aspect of the case in the Family Court. The last contention lacks merit. The Supreme Court has concurrent original jurisdiction with the Family Court and it is within its discretion to entertain the matter or transfer it to the Family Court.

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(Kagen v. Kagen, 21 NY 2d 532.) On this record, we are unable to conclude that the court abused its discretion, and therefore, this portion of the judgment should be affirmed.

A more trouble some problem is presented by defendant's contention that the court erred in granting exclusive possession of the Argyle farm to plaintiff. The court had the power to direct defendant to furnish plaintiff with a place to live from any of the properties owned by him. (Domestic Relations Law, 234.) Before exclusive possession is awarded, however, the court must consider all of the circumstances, and particularly, the effect of exclusive possession of property by one spouse on the ability of the other to earn a living. (See Bernstein v. Bernstein, 36 A D 2d 620; Jemzura v. Jemzura, 29 A D 2d 797.) It must also consider the size of

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the family to be accommodated by the property. (see Parlato v. Parlato, 44 A D 2d 720.) The record reveals that plaintiff owned the former marital residence in his own name, but later conveyed it to his sister, thereby making it impossible for defendant to stay there. Although the son also lives with defendant, it is most significant that the property in question contains 174 acres and at the time of the separation was being operated by plaintiff as a farm. Manifestly, defendant and the son do not require a going farm of 174 acres on which to reside. On the other hand, exclusive possession thereof by defendant deprives plaintiff of his present means of earning a living and of obtaining the necessary funds to comply with the financial obligations of the judgment. Considering the record in its entirety, we are of the opinion that it was an improvident exercise of

discretion by the trial court to have awarded defendant exclusive possession of this property, and that part of the judgment should be modified to allow plaintiff to operate his farming business thereon. (See Bernstein v. Bernstein, supra, p. 621; Jemzura v. Jemzura, supra.)

We next turn to the question of alimony. The court clearly has the authority to grant a wife alimony (Domestic Relations Law, 236). Statutory guidelines in determining the amount to be paid have been expanded by decisional law to include the husband's financial resources, the established standard of living of the parties, and, to a limited extent, the parties' conduct. There must also be a realistic balancing of the wife's needs and her resources with the husband's ability to pay. (Kover v. Kover, 20 N Y 2d, 416.) In the instant case defendant enjoys good health, has

assets of her own and a home provided by plaintiff, together with a weekly income for the minor child residing with her. Conversely, plaintiff is engaged in a non-productive business acquiesced in by defendant when the parties were living together as husband and wife. Plaintiff's circumstances are unlike his counterpart in Kover v. Kover (29 N Y 2d 408), Brandt v. Brandt (36 Misc 2d 901) and the other cases relied on by defendant. Consequently, since plaintiff lacks the actual financial ability to pay the alimony and defendant has ample income to support herself, we are of the opinion that the judgment should be further modified to strike out that portion which requires plaintiff to pay alimony at the present time.

Judgment modified, on the law and the facts, (1) by deleting from the third decretal paragraph the award to defendant

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for alimony; and (2) by adding to fourth decretal paragraph the provision that plaintiff is permitted to use the "Argyle Farm" for his farming operation, excluding the residence thereon, and, as so modified, affirmed without costs.

STALEY, JR., J. P., SWEENEY, KANE, MAIN AND REYNOLDS, JJ., concur.

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STATE OF NEW YORK

COURT OF APPEALS

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3 No. 16

Richard A. Hickland,

Respondent,

vs. OPINION

Alice M. Hickland,

Appellant.

(16)

John S. Hall for appellant.

Richard A. Hickland, pro se, and John J. Carusone, Jr. for Richard A. Hickland, respondent.

FUCHSBERG, J.:

This appeal presents questions relating to the fixing of alimony where a divorcing wife and husband each have separate means of producing current income and the husband has chosen not to exercise those available to him.

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Special Term awarded the appellant wife alimony of $50 per week and exclusive possession of a house and the farm land on which it is located. The Appellate Division struck the alimony award and gave the respondent husband the right to enter the land in order to farm it, although continuing in the wife possession of the house itself. The wife now seeks reinstatement of the awards made at Special Term. For the reasons which follow, the order of the Appellate Division should be modified to reinstate the alimony award.

The parties were married in 1946. They have two children, one of whom is over twenty-one and the other of whom is nineteen years of age. The wife has been a school teacher for some years' the husband, employed as an engineer, had, by 1968, reached an annual earnings level of some

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$45,000 plus bonuses and benefits. Those earnings constituted the bulk of their income.

In 1968 the husband persuaded his wife to let him try his hand at full-time farming as an occupation. This occupational change was an experiment and, according to the proof, the wife agreed to it in the expectation that it would provide them with a living. When she made this commitment, she was aware of the fact that a substantial amount of deferred income, scheduled to be received from his former employer, would help to support them during the initial phase of the change. After putting the plan into effect, the parties continued to live in the marital residence. The professional farming took place at another location, known as Argyle Farm. Contrary to expectations, the farming venture proved to be a losing proposition.

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In 1969, when a tractor accident temporarily sidelined the husband, he hired someone else to run the farm, devoting himself instead to freelance management consulting, for which he possessed an expertise developed during his engineering career. He quickly proved his continued high earning capacity in that calling. Because he failed to file income tax returns for the last few years of the marriage, the trial court was unable to ascertain the husband's exact consulting income, but his own testimony established it at not less than $35,000 net annually until 1972, the year in which separation proceedings, which preceded the ultimate divorce, were begun. In that year, midst negotiations for a separation agreement, he decided to abandon an outgoing consulting assignment which would have paid him approximately $2,000 for some ten weeks' work. Insisting that he was a full-time farmer, he has steadfastly

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refused all offers of consulting employment ever since.

During the same period, the husband also entered into a contract with a sister. By its terms, he turned over to her title to all of his New York real estate, including the marital residence and Argyle Farm, along with various stocks and bonds which he then owned. There was no cash consideration for the transfer. Instead, the sister forgave him a small loan and guaranteed him the use of a car and its related expenses, all the food he needed from the farm, a remodeled house in which to live in rent-free, $15,000 in benefits to each of his children upon his death, a college education for his minor son, and a percentage of any possible profits from the farm and the stock portfolio without salary. Under the arrangement, while

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necessarily conceding that he has turned himself into the guaranteed recipient of present creature comforts for himself and future benefits for his children, he asserts he is a subsistence farmer with no income from which to pay alimony to his wife.

Special Term found that he was to be regarded as a management consultant up to the time of the divorce and that his continued self-classified status as a subsistence farmer was at least in major part a ploy to put his assets beyond his wife's reach. The Appellate Division, on the other hand, put great store in the husband's original plan to become a farmer, even though unilaterally renewed at the time of the divorce by him. In effect, it charged the wife with having assumed the risk that the farm venture would not pay.

It appears to us, however, that the record amply supports Special Term's finding that the husband here deliberately stripped himself of income for the reasons which went beyond the needs of a reasonable occupational choice. It is clear that he is capable of earning a substantial income. And his arrangement with his sister reeks of an impermissible attempt to avoid his obligation to his wife.

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Nor can the husband excuse his attempted avoidance of his obligations by an exaggerated reliance on his wife's acquiescence in his plan to take up farming. As already indicated the husband never actually put his plan into full practice while the marriage was viable, but only after the parties had already separated. By then the pressures of self-interest were too great for the evidence of a sham to be overlooked. Moreover, her acquiescence itself is not to be deemed to extend to all possible ramifications of her husband's decision

since it is manifest that at all times prior to the divorce, the farms' unprofitability was viewed by both parties as a temporary circumstance ameliorated by the husband's consulting income. Her consent, such as it was, was hardly one to be enforced as though given to an impersonal, arm's-length agreement made in the market place.

It is the actual marital standard of living, realistically appraised, which provides the basis for an award of alimony where the husband can afford to maintain that standard, unless he can present genuine reasons, vocational or otherwise, upon which the court could justify a lesser award (see Kay v. Kay, supra, at 637 and cases cited therein; Kover v. Kover, supra). So measured, the husband's proof fell far short of showing that his lack of income

was either unavoidable or the result of a plan to which the wife was irrovocably committed. Under such circumstances, a husband is under an obligation to use his assets and earning powers if these are required in order to meet his obligation to maintain the marital standard of living (Domestic Relations Law 236; Kay v. Kay, supra; DeBrauwere v. DeBrauwere, 203 NY 460; Nocilla v. Nocilla, 212 NYS 2d 654; Brandt v. Brandt, 36 Misc. 2d 901; Hoffman v. Hoffman, 63 Misc. 2d 245).

Given this husband's ability to provide support, the question that still remains is whether his wife's needs are such that she is in fact entitled to alimony. For Domestic Relations Law 236 states that alimony shall be awarded "as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of the wife to be self-supporting,

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the circumstances of the case and of the respective parties" (emphasis added).

The respondent husband suggests that the emphasized language should be interpreted to mean that whenever a wife's income provides her basic needs the marital standard of living, the length of the marriage, and other factors should be largely irrelevant. Such an interpretation goes too far. In Kover (supra), and in the two companion cases decided with it, in interpreting 236 as it applies to a wife's ability to earn an income, We left the parties with incomes as nearly equal as circumstances permitted. Moreover, all three of the Kover cases involved self-supporting wives whose marriages were childless and of relatively short duration. None of them had made the kind of long-term substantial investment in marriage involved in the present case.

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Here the marriage was of over twenty-five years' duration. During that quarter of a century the parties aided each other in the completion of their own higher educations, launched careers, reared a family and otherwise were partners in the full panoply of concerns and strivings that are bound to exist over such a long period. Where there has been a joinder of such duration and involvement, there can be no automatic non-entitlement to alimony in the wife simply because she has some separate earnings or income, Each case must be determined on its own facts and figures, including, of course, the pertinent and relative financial circumstances of the parties. And where incomes and resources are neither fixed nor stereotyped, as in the husband's case here, a sophisticated elasticity must be brought to bear in reaching a determination.

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The wife here nets approximately $8,000 per year as a schoolteacher. She now has the use of the Argyle house. Compared with the undisputedly ample marital standard of living and with the husband's demonstrated earning potential, on the facts here it was an abuse of discretion to deny her the very modest alimony allowance of $50 per week awarded by Special Term, and, therefore, to the extent that the order of the Appellate Division does so, we believe it should be modified. (Orenstein v. Orenstein, 21 NY 2d 992; Trippe v. Trippe, 19 NY 2d 944; Sacknoff v. Sacknoff, 7 NY 2d 771.)

On the other hand, we find the modification by the Appellate Division, which, while leaving the wife in exclusive possession of the Argyle residence, permitted the husband access to the farm itself, to have been entirely appropriate. The husband's contract

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with his sister and the confused transactions arising out of a recinsion of the couple's initial separation agreement (See Hickland v. Hickland and Eaton, 46 AD 2d 1) prevented the courts below from awarding possession of the marital residence to the wife. In its place, therefore, Special Term awarded her the use of the Argyle Farm and its residence. However, it was not necessary to deprive the husband of the use, for his farming enterprise, of the large acreage beyond that farily surrounding the residence and it necessary appurtenances in order to provide a home for the wife. (See Bernstein v. Bernstein, 36 AD 2d 620; Jemzura v. Jemzura, 29 AD 2d 797, affd 25 NY 2d 1021).

Accordingly, so much of the order of the Appellate Division as denied alimony to the wife should be modified and the award by Special Term of $50 per week reinstated;

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the order is otherwise affirmed.

****

Order modified with costs to defendant, in accordance with the opinion herein and as so modified, affirmed. Opinion by Fuschsberg, J. All concur.

Decided February 24, 1976

APPENDIX D

Mo. No. 626

Richard A. Hickland,

Respondent,

vs.

Alice M. Hickland,

Appellant.

Motion for reargument denied.

Decision Court of Appeals June 17, 1976